

UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH DAKOTA
WESTERN DIVISION

UNITED STATES OF AMERICA

and

THE STATE OF SOUTH DAKOTA,

Plaintiffs,

v.

COCA MINES, INC.

and

THOMAS E. CONGDON, individually,

Defendants.

CASE NO.

CONSENT DECREE

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I. BACKGROUND

A. The United States of America (“United States”), on behalf of the Administrator of the United States Environmental Protection Agency (“EPA”), and the State of South Dakota (“State”), on behalf of the Secretary of the South Dakota Department of Environment and Natural Resources (“DENR”), filed a complaint in this matter pursuant to Section 107 of the Comprehensive Environmental Response, Compensation, and Liability Act (“~~CERCLA~~ CERCLA”), 42 U.S.C. § 9607, and Chapter 34A-12 of South Dakota Codified Law (“SDCL”), seeking reimbursement of response costs incurred or to be incurred for response actions taken or to be taken at or in connection with the release or threatened release of hazardous substances at the Gilt Edge Mine Site in Lawrence County, South Dakota (the “Site”).

B. In response to the release or threatened release of hazardous substances at or from the Site, EPA and the State undertook response actions at the Site pursuant to Section 104 of CERCLA, 42 U.S.C. § 9604, and will undertake additional response actions in the future.

C. In performing response action at the Site, EPA and the State have incurred response costs and will incur additional response costs in the future.

D. The United States and the State allege that CoCa Mines, Inc. and Thomas E. Congdon, Individually (collectively, the “Settling Defendants”), as defined below are responsible parties pursuant to Section 107(a) of CERCLA, 42 U.S.C. § 9607(a), and Chapter 34A-12-12 of SDCL, and are jointly and severally liable for response costs incurred and to be incurred at the Site.

E. The United States has reviewed the Financial Information, including relevant insurance policies and documents, submitted by CoCa Mines, Inc. to determine whether the

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~~Defendant~~ CoCa Mines Inc. is financially able to pay response costs incurred and to be incurred at the Site. Based upon this Financial Information, the United States has determined that CoCa Mines, Inc. has limited financial ability to pay for response costs incurred and to be incurred at the Site.

F. Thomas E. Congdon previously held the position of President and Chief Executive Officer of CoCa Mines Inc., was a shareholder of CoCa Mines Inc., and served as both general partner and limited partner of Congdon and Carey, Ltd. No. 3, a Colorado Limited Partnership. ~~Thomas E. Congdon~~ also served as both general partner and limited partner of Congdon and Carey, Ltd. No. 5, a Colorado Limited Partnership.

G. The Settling Defendants ~~that have entered into this Consent Decree~~ do not admit any liability to Plaintiffs, to each other, or any third party arising out of the transactions or occurrences ~~that are alleged or could have been alleged in the complaint.~~

~~H. complaint~~ or arising out of any conditions related to the Site, nor do they acknowledge that any release or threatened release of hazardous substances has occurred at or from the Site, or that any such claimed release or threatened release constitutes an imminent or substantial endangerment to the public health or welfare or the environment. The United States, the State, and Settling Defendants (collectively, the "Parties") agree that this Consent Decree shall not be admissible in any judicial or administrative proceeding as evidence of any Settling Defendant's liability for the Matters Addressed, as defined below, except in a proceeding to enforce this Consent Decree or in CoCa Mines Inc.'s litigation against Travelers, as defined below.

H. The Parties agree, and this Court by entering this Consent Decree finds, that this Consent Decree has been negotiated by the Parties in good faith, that settlement of this matter

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will avoid prolonged and complicated litigation between the Parties, and that this Consent Decree is fair, reasonable, and in the public interest.

NOW, THEREFORE, it is hereby ORDERED, ADJUDGED, AND DECREED:

II. JURISDICTION

1. This Court has jurisdiction over the subject matter of this action pursuant to 28 U.S.C. §§ 1331, 1345 and 1367, 42 U.S.C. §§ 9607 and 9613(b), and also has personal jurisdiction over Settling Defendants. Solely for the purposes of this Consent Decree and the underlying complaint, Settling Defendants waive all objections and defenses that they may have to jurisdiction of the Court or to venue in this District. Settling Defendants shall not challenge entry or the terms of this Consent Decree or this Court's jurisdiction to enter and enforce this Consent Decree.

III. PARTIES BOUND

2. This Consent Decree is binding upon the United States, the State, and upon Settling Defendants and their successors and assigns. Any change in ownership or corporate or other legal status, including, but not limited to, any transfer of assets or real or personal property, shall in no way alter the status or responsibilities of Settling Defendants under this Consent Decree.

IV. DEFINITIONS

3. Unless otherwise expressly provided in this Consent Decree, terms used in this Consent Decree that are defined in CERCLA or in regulations promulgated under CERCLA shall have the meaning assigned to them in CERCLA or in such regulations. Whenever terms listed below are used in this Consent Decree or its appendices, the following definitions shall apply:

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“CERCLA” shall mean the Comprehensive Environmental Response, Compensation, and Liability Act, 42 U.S.C. §§ 9601-9675.

“CoCa Mines, Inc.” shall mean CoCa Mines, Inc., a corporation organized under the laws of the State of Colorado.

CoCa’s Insurers” shall mean Northern Insurance Co. of New York, Maryland Casualty Company, Commercial Union Insurance Company, and Employers Fire Insurance Company.

“Congdon” shall mean Thomas E. Congdon, ~~Individually~~, a resident of the State of Colorado, individually and in all capacities, including but not limited to., as former President and Chief Executive Officer of CoCa Mines, Inc., shareholder of CoCa Mines Inc., and general partner and limited partner of Congdon and Carey, Ltd. No. 3 and general partner and limited partner of Congdon and Carey, Ltd. No. 5.

“C&C3” shall mean the defunct partnership Congdon and Carey, Ltd. No. 3, including all general and limited partners, employees, or agents.

“C&C5” shall mean the defunct partnership Congdon and Carey, Ltd. No. 5, including all general and limited partners, employees, or agents.

“Consent Decree” shall mean this Consent Decree and all appendices attached hereto. In the event of a conflict between this Consent Decree and any appendix, this Consent Decree shall control.

“Day” or “day” shall mean a calendar day. In computing any period of time under this Consent Decree, where the last day would fall on a Saturday, Sunday, or federal or state holiday, the period shall run until the close of business of the next working day.

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“DENR” shall mean the South Dakota Department of Environment and Natural Resources.

“DOJ” shall mean the United States Department of Justice and its successor departments, agencies, or instrumentalities.

“Effective Date” shall mean the date upon which the approval of this Consent Decree is recorded on the Court’s docket.

“EPA” shall mean the United States Environmental Protection Agency and its successor departments, agencies, or instrumentalities.

“EPA Hazardous Substance Superfund” shall mean the Hazardous Substance Superfund established by the Internal Revenue Code, 26 U.S.C. § 9507.

“Financial Information” shall mean the financial information submitted to the EPA by CoCa Mines, Inc. and Hecla Limited (f/k/a Hecla Mining Company) pursuant to Section 104(e) of CERCLA, 42 U.S.C. § 9604(e) and/or as otherwise requested by DOJ, in response to requests for information dated August 14, 2008, December 9, 2009, September 21, 2010, April 8, 2011, February 7, 2013, and March 31, 2014.

“Gilt Edge Special Account for Remedial Action” shall mean the special account, within the EPA Hazardous Substance Superfund, established for the Site by EPA pursuant to Section 122(b)(3) of CERCLA, 42 U.S.C. § 9622(b)(3) to fund future response actions at or in connection with the Site.

“Insurance Policy” shall mean the ~~umbrella~~ CGL liability insurance policy number CF257G347-8, with a policy period of July 30, 1984 to July 30, 1985, issued by

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~~Travelers Constitution State Insurance Company to CoCa Mines, Inc. for the Gilt Edge Mine Site known as Policy No. [PLEASE PROVIDE POLICY NUMBER AND DESCRIPTION HERE]~~

“Interest” shall mean interest at the rate specified for interest on investments of the EPA Hazardous Substance Superfund established by 26 U.S.C. § 9507, compounded annually on October 1 of each year, in accordance with 42 U.S.C. § 9607(a). The applicable rate of interest shall be the rate in effect at the time the interest accrues. The rate of interest is subject to change on October 1 of each year. Rates are available online at http://www.epa.gov/ocfopage/finstatement/superfund/int_rate.htm.

“National Contingency Plan” or “NCP” shall mean the National Oil and Hazardous Substances Pollution Contingency Plan promulgated pursuant to Section 105 of CERCLA, 42 U.S.C. § 9605, codified at 40 C.F.R. Part 300, and any amendments thereto.

“Paragraph” shall mean a portion of this Consent Decree identified by an Arabic numeral or an upper or lower case letter.

“Parties” shall mean the United States, the State of South Dakota, and Settling Defendants.

“Plaintiffs” shall mean the United States and the State of South Dakota.

“RCRA” shall mean the Solid Waste Disposal Act, 42 U.S.C. §§ 6901-6992, also known as the Resource Conservation and Recovery Act.

“SDCL” shall mean South Dakota Codified Law.

“Section” shall mean a portion of this Consent Decree identified by a Roman numeral.

“Settling Defendants” shall mean ~~CoCa Mines, Inc. and Congdon Thomas F. Congdon, Individually.~~

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“Settling Defendants’ Related Parties” shall mean: (i) Settling Defendants’ successors ~~and, assigns, and estates,~~ but only to the extent that the liability of such person ~~or entity~~ is based on the liability of Settling Defendants; (ii) Settling Defendants’ former or current officers, directors and employees, but only to the extent that the liability of such person is based on acts and/or omissions which occurred in the scope of the person’s employment or capacity as an officer, director, and employee; (iii) Hecla Limited (f/k/a Hecla Mining Company) in its capacity as ~~the corporate parent of CoCa or as an alleged debtor to CoCa or as an alleged successor to relevant liabilities of CoCa-Mines, Inc.,~~ including without limitation any assumption of liabilities, whether direct or indirect, express or implied, arising from the ownership and ~~operations interests, activities or involvement of CoCa-Mines, Inc.,~~ at ~~or with respect to the Site;~~ and (iv) the former or current officers, directors and employees of Hecla Limited (f/k/a Hecla Mining Company), but only to the extent that the liability of such person is based on the person’s employment or capacity as an officer, director, and employee of Hecla Limited (f/k/a Hecla Mining Company); ~~(v) C&C3; and, (vi) C&C5.~~

“Site” shall mean the Gilt Edge Mine Superfund Site, encompassing approximately 1,229 acres, located 4.5 miles southeast of the town of Lead in the northern Black Hills in Lawrence County, South Dakota, and as generally depicted on the map attached hereto as Appendix A-

———“State” shall mean ~~the State of South Dakota, and anywhere hazardous substances from the Site have come to be located.~~

“State” shall mean the State of South Dakota and each of its departments, agencies and instrumentalities, including DENR.

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“Travelers Insurance” shall mean Travelers Indemnity Company, a member of the Travelers group of companies, which has advised CoCa that it has assumed the assets and liabilities of Constitution State Insurance Company, including the Insurance Company Policy Number [PLEASE PROVIDE NUMBER AND DESCRIPTION OF POLICY] No. CF257G347-8 issued by Constitution State Insurance Company for the period of July 30, 1984 to July 30, 1985.

“United States” shall mean the United States of America and each department, agency, and instrumentality of the United States of its departments, agencies, and instrumentalities, including EPA.

V. STATEMENT OF PURPOSE

4. By entering into this Consent Decree, the mutual objective of the Parties is for Settling Defendants to make a cash payment to resolve their alleged civil liability with regard to the Site under Section 107 of CERCLA, 42 U.S.C. § 9607, as provided in the Covenants by Plaintiffs in Section VIII, subject to the Reservations of Rights by United States in Section IX.

VI. PAYMENT OF RESPONSE COSTS

5. Cash Payment by Settling Defendants for Response Costs. Settling Defendants shall pay to EPA and the State of South Dakota the principal aggregate cash amount of \$ten million three hundred thousand dollars (\$10.3 million dollars). The payment shall be made within 4560 days after the Effective Date and, if timely paid, shall include no Interest.

6. Of the principal cash amount to be paid by Settling Defendants pursuant to Paragraph 5 (Cash Payment by Settling Defendants for Response Costs), the sum of nine million two hundred seventy thousand dollars (\$9.27 million) shall be paid within 45 days after the Effective Date to

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EPA and deposited into the Gilt Edge Special Account, to be retained and used by EPA to fund future response actions at or in connection with the Site, or to be transferred by EPA to the EPA Hazardous Substance Superfund. Of the ~~principal cash~~ amount to be paid by Settling Defendants pursuant to Paragraph 5 (Cash Payment by Settling Defendants for Response Costs), the sum of one million thirty thousand dollars (\$1.03 million) shall be paid within 30 days after the Effective Date to the State of South Dakota. ~~If payments are timely paid, they shall include no interest.~~

7. Insurance Claims and Recovered Amounts for Response Costs. ~~a. CoCa Mines, Inc.~~ shall ~~make insurance claims~~ has made a claim, pursuant to the Insurance Policy, and pay recovered amounts as response costs to the EPA up to a total of seven hundred thousand dollars (\$700,000). ~~CoCa Mines, Inc. shall use "best efforts" to obtain such indemnification and recovery from the Insurance Policy held by it against Travelers for the Gilt Edge Mine Site. For purposes of this paragraph, "best efforts" shall mean: (i) asserting defense and indemnity for the claims asserted by the United States and the State against CoCa, which claims are resolved in this Agreement. Travelers has failed and refused to satisfy its defense and indemnity obligations to CoCa under the Insurance Policy. CoCa shall file a lawsuit against Travelers seeking to recover on Travelers' indemnity obligation under the Insurance Policy to CoCa for the payment of response costs. CoCa shall exercise good faith in the prosecution of and in any settlement of the lawsuit against Travelers. CoCa shall be responsible for the conduct of the litigation, including the costs and attorneys' fees incurred therewith. CoCa's exercise of "good faith" under this paragraph shall mean: that (i) CoCa will file and serve a lawsuit on Travelers and will diligently prosecute that lawsuit with counsel experienced in insurance coverage litigation and~~

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~~that CoCa is entitled to rely on the advice of counsel as to the most effective and efficient means of prosecuting the insurance coverage action, including advice on settlement, discovery and trial strategy in and pursuing claims for coverage under the Insurance Policy; and (ii) negotiating or litigating~~CoCa shall have the right to negotiate, litigate to obtain the most favorable a reasonable resolution as possible of claims under the Insurance Policy; and (iii) reporting of the lawsuit given the entirety of the facts and circumstances, coverage issues and defenses, availability of witnesses and other strategic decisions in the judgement of coverage counsel and CoCa. CoCa shall report quarterly in writing on the status of the negotiations or litigation to the DOJ and EPA per Section XIII (Notices and Submissions). CoCa Mines, Inc. shall submit advise DOJ of the status of any proposed settlement of claims under the Insurance Policy and related to the Gilt Edge Mine Site to the United States for approval in its quarterly reports. Payments of recovered amounts from the Insurance Policy shall be made as follows:_____

~~_____a. One~~ i. CoCa shall pay one hundred percent (100%) of the first \$400,000 recovered under the Insurance Policy shall be paid to the EPA per the instructions provided in Paragraph 8 (Payment Instructions for Response Costs by Settling Defendants).

~~_____b. Fifty percent (50%) of amounts recovered after the first \$400,000 (pursuant to subsection a., above) in indemnity payments recovered under the Insurance Policy, up to a total of seven hundred thousand dollars (\$700,000), shall be paid to the EPA per the instructions provided in Paragraph 8 (Payment Instructions for Response Costs by Settling Defendants).~~

- _____ ii. CoCa shall pay fifty percent (50%) of amounts recovered in indemnity payments under the Insurance Policy after the first \$400,000 (pursuant to subsection i., above) under the Insurance Policy, up to an aggregate total of \$700,000, to the EPA per the instructions

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provided in Paragraph 8 (Payment Instructions for Response Costs by Settling Defendants). The remaining 50% shall be retained by CoCa.

iii. CoCa shall be entitled to recover and retain its costs of litigation, including attorneys fees and costs incurred, as well as any monies paid by Travelers for breach of its duty to defend CoCa.

b. The United States and the State agree not to assert any claims against the CoCa Insurers or Travelers.

8. Payment Instructions for Response Costs by Settling Defendants. Payments due to the EPA and required by Settling Defendants pursuant to Section VI, Paragraph 5 (Cash Payment by Settling Defendants for Response Costs), and by CoCa ~~Mines, Inc.~~ pursuant to Section VI, Paragraph 7 (Insurance Claims and Recovered Amounts for Response Costs), shall be made by Fedwire Electronic Funds Transfer ("EFT") to the U.S. Department of Justice account in accordance with current EFT procedures, and in accordance with instructions provided to Settling Defendants by the Financial Litigation Unit ("FLU") ~~after~~ within 30 days of the Effective Date. The payment instructions provided by the FLU shall include a Consolidated Debt Collection System ("CDCS") number, which shall be used to identify all payments required to be made in accordance with this Consent Decree. Payment by Settling Defendants to the State of South Dakota shall be made in accordance with instructions provided to Settling Defendants by the State ~~after~~ within 30 days of the Effective Date. The FLU and the State shall provide the payment instructions ~~to~~ on behalf of the Settling Defendants to [Escrow Agent] at:

Betsy Temkin

Partner

TEMKIN WIELGA & HARDT LLP

1900 Wazee Street

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CoCa Mines Inc.
c/o Hecla Limited
6500 N. Mineral Dr., Suite 303 1800-S200
Denver, CO 80202
Coeur d'Alene, ID 83815-940
Attention: Legal Dept.

Thomas E. Congdon
1776 Lincoln Street
Suite 800
Denver, CO 80203

Settling Defendants may change the individual to receive payment instructions on their behalf by providing written notice of such change to DOJ and EPA in accordance with Section XIII (Notices and Submissions).

EPA Cincinnati Finance Office
26 Martin Luther King Drive

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Cincinnati, Ohio 45268

Such notice shall reference the CDCS Number, Site/Spill ID Number 08-7T, and DOJ Case Number 90-11-3-11179.

VII. FAILURE TO COMPLY WITH CONSENT DECREE

10. Interest on Late Payments. ~~If either of the Settling Defendants fails fail~~ to make any of the payments payment required by Section VI ~~(, Paragraph 5 (Cash Payment of by Settling Defendants for Response Costs)~~ by the required due dates ~~, Interest date, interest~~ shall accrue on the unpaid balance from the Effective Date through the date of payments payment. ~~If CoCa fails to make any payment required by Section VI, Paragraph 7 (Insurance Claims and Recovered Amounts for Response Costs) by any required due date, interest shall accrue on the unpaid balance from such due date through the date of the payment.~~

11. Stipulated Penalty.

a. ~~If any amounts the amount~~ due as required by Section VI Paragraph 5 (Payment of Response costs) ~~are Costs~~ is not paid by the required due dates date, Settling Defendants shall be in violation of this Consent Decree and shall pay, as a stipulated penalty, in addition to the Interest required by Paragraph 10 (Interest on Late Payments), ~~one thousand five hundred~~ dollars ~~(\$1,000) (\$500)~~ per violation per day that such payment is late. _____

~~_____ b. If Settling Defendant CoCa Mines fails to use best efforts to pursue payment from Traveler's Insurance in accordance with Paragraph 7 (Insurance Claims and Recovered Amounts for Response Costs), CoCa Mines shall be in violation of this Consent Decree and shall pay, as a stipulated penalty, \$1,000 per day for each day of failure to use best efforts to pursue such payment.~~

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_____e. _____ b. Stipulated penalties are due and payable within thirty (30) days after the date of the demand for payment of the penalties by EPA or the State. All payments to EPA under this Paragraph shall be identified as “stipulated penalties” and shall be made by Fedwire Electronic Funds Transfer to:

Federal Reserve Bank of New York
ABA = 021030004
Account = 68010727
SWIFT address = FRNYUS33
33 Liberty Street
New York NY 10045
Field Tag 4200 of the Fedwire message should read “D 68010727 Environmental Protection Agency”

and shall reference the CDCS Number, Site/Spill ID Number 08-7T, and DOJ Case Number 90-11-3-11179.

Commented [A1]: The U.S. has a sufficient remedy with the Court if the U.S. believes we are not proceeding in good faith. This is not an issue like missing a deadline that is appropriate for stipulated penalties.

c. At the time of payment, Settling Defendants/Defendant(s) shall send notice that payment has been made to DOJ, EPA and the State in accordance with Section XIII (Notices and Submissions), and to the EPA Cincinnati Finance Office by email at acctsreceivable.cinwd@epa.gov, or by mail to:

EPA Cincinnati Finance Office
26 Martin Luther King Drive
Cincinnati, Ohio 45268

Such notice shall reference the CDCS Number, Site/Spill ID Number 08-7T, and DOJ Case Number 90-11-3-11179.

d. Penalties shall accrue as provided in this Paragraph regardless of whether EPA or the State has notified Settling Defendants of the violation or made a demand for payment, but need only be paid upon demand. All penalties shall begin to accrue on the day after payment is due and shall continue to accrue through the date of payment. Nothing in this Consent Decree

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shall prevent the simultaneous accrual of separate penalties for separate violations of this Consent Decree.

12. If the United States or the State brings ~~an~~ a successful action to enforce this Consent Decree, ~~the Settling Defendants~~ Defendant(s) who did not perform shall reimburse the United States ~~and~~ or the State for all costs of such action, including but not limited to costs of attorney time.

13. Payments made under this Section shall be in addition to any other remedies or sanctions available to Plaintiffs by virtue of ~~a Settling Defendants'~~ Defendant(s)' failure to comply with the requirements of this Consent Decree.

14. The obligations of Settling Defendants to pay amounts owed the United States and the State under Section VI, Paragraph 5 of this Consent Decree and/or any stipulated penalty or Interest incurred as a result of Settling Defendants' failure to comply with Section VI, Paragraph 5 of this Consent Decree are joint and several. In the event of the insolvency of any Settling Defendant or other failure by any Settling Defendant to make the such payments required under this Consent Decree, the remaining Settling Defendant shall be responsible for such payments.

15. Notwithstanding any other provision of this Section, the United States may, in its unreviewable discretion, waive payment of any portion of the stipulated penalties that have accrued pursuant to this Consent Decree. Payment of stipulated penalties shall not excuse ~~Settling Defendants~~ Defendant(s) from payment as required by Section VI (Payment of Response Costs) or from performance of any other requirements of this Consent Decree.

VIII. COVENANTS BY PLAINTIFFS

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16. Except as specifically provided in Section IX (Reservation of Rights by Plaintiffs), the Plaintiff's covenant not to sue or to take administrative action against Settling Defendants with regard to releases or threatened releases of hazardous substances at or from the Site pursuant to Section 107(a) of CERCLA, 42 U.S.C. §9607(a-), relating to the Site, the United States covenants not to sue or take administrative action against Settling Defendants with regard relating to releases or threatened releases of hazardous substances at or from the Site pursuant to Section 106 of CERCLA, 42 U.S.C. §9606; and the State covenants not to sue or take administrative action against Settling Defendants with regard relating to releases or threatened releases of hazardous or regulated substances at or from the Site pursuant to Chapters 34A-10-1, 12-10, 34A-12-11, and 34A-12-12 of SDCL. With respect to past, present and future liability, these covenants shall take effect upon receipt by EPA and the State of all payments required by Section VI (Payment of Response Costs) and any interest or stipulated penalties due thereon under Section VII (Failure to Comply with Consent Decree) the Effective Date. These covenants are conditioned upon the satisfactory performance by Settling Defendants of their respective obligations under this Consent Decree. These covenants extend only to Settling Defendants and do not extend to any other person; provided, however, that these covenants not to sue (and the reservations thereto) shall also apply to Settling Defendants' Related Parties.

Commented [A2]: This is the model covenant language.

IX. RESERVATION OF RIGHTS BY PLAINTIFFS

17. The United States and the State reserve, and this Consent Decree is without prejudice to, all rights against Settling Defendants ~~Defendant(s)~~ with respect to all matters not expressly included within Section VIII (Covenants by Plaintiffs). Notwithstanding any other provision of

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this Consent Decree, the United States and the State reserve all rights against Settling

~~Defendants~~ Defendant(s) with respect to:

a. liability for failure of Settling ~~Defendants~~ Defendant(s) to meet a requirement of this Consent Decree;

b. criminal liability;

c. liability for damages for injury to, destruction of, or loss of natural resources, and for the costs of any natural resource damage assessments;

d. liability based on the ownership or operation of the Site by Settling ~~Defendants~~ Defendant(s) when such ownership or operation commences after signature of this Consent Decree by Settling ~~Defendants~~ Defendant(s);

e. liability based on Settling ~~Defendants~~ Defendant(s)' transportation, treatment, storage, or disposal, or arrangement for transportation, treatment, storage, or disposal of a hazardous substance or a solid waste at or in connection with the Site, after signature of this Consent Decree by Settling ~~Defendants~~ Defendant(s); and

f. liability arising from the past, present, or future disposal, release or threat of release of a hazardous substance, pollutant, or contaminant ~~outside of~~ not associated with the Site.

18. Notwithstanding any other provision of this Consent Decree, the United States and the State reserve, and this Consent Decree is without prejudice to, the right to reinstitute or reopen this action as against CoCa, or to commence a new action seeking relief against CoCa, other than as provided in this Consent Decree, if the Court determines that CoCa has withheld from disclosure material financial information responsive to the information requests listed in the definition of "Financial Information or Insurance Policy provided by CoCa Mines, Inc., or the

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indemnity certification made by Thomas E. Congdon in Paragraph e., above, is false or, in any material respect, inaccurate.”

Commented [A3]: Model language would tie the reopener to the truth of the information provided. We modified the language because the truth to be found in the financial information is obviously disputed.

X. COVENANTS BY SETTLING DEFENDANTS

19. Settling Defendants covenant not to sue and agree not to assert any claims or causes of action against the United States or the State, or their contractors or employees, with respect to the Site and this Consent Decree, including but not limited to:

a. any direct or indirect claim for reimbursement from the EPA Hazardous Substance Superfund based on Sections 106(b)(2), 107, 111, 112, or 113 of CERCLA, 42 U.S.C. §§ 9606(b)(2), 9607, 9611, 9612, or 9613, or any other provision of law;

b. any claim arising out of response actions at or in connection with the Site, including any claim under the United States Constitution; the South Dakota Constitution; the Tucker Act, 28 U.S.C. § 1491; the Equal Access to Justice Act, 28 U.S.C. § 2412, or at common law; or

c. any claim pursuant to Sections 107 or 113 of CERCLA, 42 U.S.C. §§ 9607 or 9613, Section 7002(a) of RCRA, 42 U.S.C. § 6972(a), or state law relating to the Site.

20. Except as provided in Paragraph 22 (claims against other PRPs) and Paragraph 27.26 (res judicata and other defenses), these covenants shall not apply in the event the United States or the State brings a cause of action or issues an order pursuant to any of the reservations in Section IX (Reservations of Rights by Plaintiffs), other than in Paragraph 17.a (liability for failure to meet a requirement of the Consent Decree) or 17.b (criminal liability), but only to the extent that Settling Defendants’ claims arise from the same response action or response costs that the United States or the State is seeking pursuant to the applicable reservation.

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21. Nothing in this Consent Decree shall be deemed to constitute approval or preauthorization of a claim within the meaning of Section 111 of CERCLA, 42 U.S.C. § 9611, or 40 C.F.R. 300.700(d).

~~22. Settling Defendants agree not to assert any claims and to waive all claims or causes of action (including but not limited to claims or causes of action under Sections 107(a) and 113 of CERCLA) that they may have for response costs relating to the Site against any other person who is a potentially responsible party under CERCLA at the Site. This waiver shall not apply with respect to any defense, claim, or cause of action that Settling Defendants may have against any person if such person asserts a claim or cause of action relating to the Site against Settling Defendants.~~

XI. EFFECT OF SETTLEMENT/CONTRIBUTION

~~23. Except as provided in Paragraph 22 (claims against other PRPs), nothing~~ 22. Nothing in this Consent Decree shall be construed to create any rights in, or grant any cause of action to, any person not a Party to this Consent Decree. Except as provided in Section X (Covenants by Settling Defendants), each of the Parties expressly reserves any and all rights (including, but not limited to, under Section 113 of CERCLA, 42 U.S.C. § 9613), defenses, claims, demands, and causes of action that it may have with respect to any matter, transaction, or occurrence relating in any way to the Site against any person not a Party hereto. Nothing in this Consent Decree diminishes the right of the United States, pursuant to Section 113(f)(2) and (3) of CERCLA, 42 U.S.C. § 9613(f)(2)-(3), to pursue any such persons to obtain additional response costs or response action and to enter into settlements that give rise to contribution protection pursuant to Section 113(f)(2).

Commented [A4]: Former paragraph 22 was deleted because CoCa and Mr. Congdon already have a separate agreement between them that addresses this issue and there is no reason to require waiver of third-party claims. Additionally, we note that the Cyprus and Homestake CDs do not waive claims v. 3rd parties.

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2423. The Parties agree, and by entering this Consent Decree this Court finds, that this Consent Decree constitutes a judicially approved settlement for purposes of Section 113(f)(2) of CERCLA, 42 U.S.C. § 9613(f)(2), and that Settling Defendants are entitled, as of the Effective Date, to protection from contribution actions or claims as provided by Section 113(f)(2) of CERCLA, or as may be otherwise provided by law, for “matters addressed” in this Consent Decree. The “matters addressed” in this Consent Decree are all response actions taken or to be taken and all response costs incurred or to be incurred, at or in connection with the Site, by the United States, the State or any other person. However, if the United States or the State exercises rights under the reservations in Section VIII (Reservations of Rights by Plaintiffs) other than in Paragraph 17.a (liability for failure to meet a requirement of the Consent Decree) or 17.b (criminal liability), the “matters addressed” in this Consent Decree will no longer include those response costs or response actions that are within the scope of the exercised reservation.

2524. The Parties further agree, and by entering this Consent Decree this Court finds, that the complaint filed by the United States and the State in this action is a civil action within the meaning of Section 113(f)(1) of CERCLA, 42 U.S.C. § 9613(f)(1), and that this Consent Decree constitutes a judicially-approved settlement pursuant to which Settling Defendant ~~has~~ Defendants have, as of the Effective Date, resolved their liability to the United States and the State within the meaning of Section 113(f)(3)(B) of CERCLA, 42 U.S.C. § 9613(f)(3)(B).

2625. Each Settling Defendant shall, with respect to any suit or claim brought by it for matters related to this Consent Decree, notify DOJ, EPA, and the State in writing no later than sixty (60) days prior to the initiation of such suit or claim. Each Settling Defendant also shall, with respect to any suit or claim brought against it for matters related to this Consent Decree,

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notify DOJ, EPA, and the State in writing within ten (10) days after service of the complaint or claim upon it. In addition, each Settling Defendant shall notify DOJ, EPA, and the State within ten (10) days after service or receipt of any Motion for Summary Judgment, and within ten (10) days after receipt of any order from a court setting a case for trial, for matters related to this Consent Decree.

~~27~~²⁶. In any subsequent administrative or judicial proceeding initiated by the United States or the State for injunctive relief, recovery of response costs, or other relief relating to the Site, Settling Defendants shall not assert, and may not maintain, any defense or claim against the United States or the State based upon the principles of waiver, res judicata, collateral estoppel, issue preclusion, claim-splitting, or other defenses based upon any contention that the claims raised by the United States or the State in the subsequent proceeding were or should have been brought in the instant case; provided, however, that nothing in this Paragraph affects the enforceability of the Covenants by Plaintiffs set forth in Section VIII (Covenants by Plaintiffs).

XII. RETENTION OF RECORDS AND CERTIFICATION

~~28. Until ten (10) years after the Effective Date,~~ ^{27. Until thirty (30) days after settling} ~~defendants have complied with their payment obligation under Section VI, Paragraph 5 (Cash Payment by Settling Defendants for Response Costs).~~ Settling Defendants shall preserve and retain all non-identical copies of records, reports, or other information including any that may be in electronic form (hereinafter referred to as "Records") now in its possession or control, or that come into its possession or control, that relate in any manner to their liability under CERCLA with respect to the Site, or the liability of any person under CERCLA with respect to the Site, regardless of any corporate retention policy to the contrary.

Commented [A5]: This is consistent with the Cyprus CD.

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~~29. After~~28. For a period of three (3) years after the conclusion of the document retention period in the preceding paragraph, ~~for a period of three (3) years from the Effective Date~~, Settling Defendants shall notify DOJ, EPA, and the State at least ninety (90) days prior to the destruction of any such Records, and, upon request by DOJ, EPA, or the State, and subject to any claim confidentiality or privilege, Settling Defendants shall deliver, at the cost of the requesting Party, any such Records to DOJ, EPA, or the State. Settling Defendants may assert that certain Records are confidential or privileged under the attorney-client privilege or any other privilege or doctrine recognized by state or federal law, including business confidentiality pursuant to Section 104(e)(7) of CERCLA and 40 C.F.R. §2.203(b). If Settling Defendants assert such a privilege, they shall provide Plaintiffs with the following: (a) the title of the Record; (b) the date of the Record; (c) the name, title, affiliation (e.g., company or firm), and address of the author of the Record; (d) the name and title of each addressee and recipient; (e) a description of the subject of the Record; and (f) the privilege asserted. If a claim of privilege applies only to a portion of a Record, the record shall be provided to the United States in redacted form to mask the privileged portion only. Settling Defendants shall retain all records that they claim to be privileged until the United States has had a reasonable opportunity to dispute the privilege claim and any such dispute has been resolved in the Settling Defendants' favor. However, no Records created or generated pursuant to the requirements of this Consent Decree shall be withheld on the grounds that they are privileged or confidential.

~~30. Settling Defendants may assert that all or part of a Record is privileged or protected as provided under federal law, provided it complies with Paragraph 30.a., below, and except as provided in Paragraph 30.b., below.~~

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~~_____ a. If any Settling Defendant asserts a claim of privilege or protection, it shall provide Plaintiffs with the following information regarding such Record: its title; its date; the name, title, affiliation (e.g. company or firm), and address of the author, each addressee, and of each recipient; a description of the Record's contents; and the privilege or protection asserted. If a claim of privilege or protection applies only to a portion of a Record, Settling Defendant asserting such claim of privilege or protection shall provide the Record to Plaintiffs in redacted form to mask the privilege or protected information only. Settling Defendants shall retain all Records that they claim to be privileged or protected until the United States has had a reasonable opportunity to dispute the privilege or protection claim and any such dispute has been resolved in Settling Defendant's favor.~~

~~_____ b. Settling Defendants may make no claim of privilege or protection regarding: (1) any data regarding the Site, including but not limited to, all sampling, analytical, monitoring, hydrogeologic, scientific, chemical, radiological, or engineering data, or the portion of any other Record that evidences conditions at or around the Site; or (2) the portion of any Record that Settling Defendants are required to create or generate pursuant to this Consent Decree.~~

~~_____ 31. After the conclusion of the document retention period, Settling Defendant shall notify EPA and DOJ and the State at least 90 days prior to the destruction of any Such Records; and, upon request by EPA or DOJ or the State, except as provided in Paragraph 30 (privileged and protected claims) and Paragraph 29 (business confidential claims), Settling Defendants shall deliver any such Records to EPA or DOJ or State.~~

~~_____ 32. _____ a. _____ 29. a. Each Settling Defendant certifies individually that, to the best of its knowledge and belief, after thorough inquiry, it has: (i) not altered, mutilated, discarded,~~

Commented [A6]: The material in former ¶¶ 30 and 31 is already addressed in ¶ 28.

Commented [A7]: Pared down to model.

[PAGE * MERGEFORMAT]

destroyed or otherwise disposed of any Records (other than identical copies) relating to its potential liability regarding the Site since notification of potential liability by the United States;

(ii) that it has fully complied with any and all EPA requests for information regarding the Site and Settling Defendant's financial circumstances, including but not limited to any requests for insurance and indemnity information, pursuant to Sections 104(e) and 122(e) of CERCLA, 42 U.S.C. §§ 9604(e), 9622(e), and

b. ~~CoCa Mines, Inc.~~ certifies that, to the best of its knowledge and belief, after thorough inquiry, it has: ~~(i) submitted to EPA financial information that it believes fairly, accurately, and materially sets forth its financial circumstances, and that those circumstances have not materially changed between the time the financial information was submitted to EPA and the time Settling Defendant executes this Consent Decree; and (ii) fully disclosed any information regarding the existence of any insurance policies or indemnity agreements that may cover claims relating to cleanup of the Site, and submitted to EPA upon request such insurance policies, indemnity agreements, and information CoCa executes this Consent Decree.~~

Commented [A8]: Paragraph 29(a), above, already covers disclosure and submittal.

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XIII. NOTICES AND SUBMISSIONS

~~3330~~. Whenever, under the terms of this Consent Decree, notice is required to be given or a document is required to be sent by one party to another, it shall be directed to the individuals at the addresses specified below, unless those individuals or their successors give notice of a change to the other Parties in writing. Except as otherwise provided, notice to a Party by email (if that option is provided below) or by regular mail in accordance with this Section satisfies any notice requirement of the Consent Decree regarding such Party.

As to DOJ by email: eeccasemanagement.enrd@usdoj.gov

As to DOJ by regular mail:

EES Case Management Unit
U.S. Department of Justice
Environment and Natural Resources Division
P.O. Box 7611
Washington, D.C. 20044-7611
Re: DJ #90-11-3-11179

Heidi K. Hoffman
Trial Attorney
Environmental Enforcement Section
U.S. Department of Justice
999 18th Street, South Terrace, Suite 370
Denver, CO 80202

As to EPA:

Amelia Piggott
Enforcement Attorney
U.S. EPA Region 8
1595 Wynkoop Street
Denver, CO 80202

As to the State:

Richard M. Williams

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Deputy Attorney General
State of South Dakota
1302 East Highway 14, Suite 1
Pierre, SD 57501
(605) 773-3215

Mark Lawrensen
Senior Scientist
Department of Environment and Natural Resources
State of South Dakota
Joe Foss Bldg.
523 E. Capitol
Pierre, SD 57501

As to Settling Defendants: CoCa Mines Inc.:

Betsy CoCa Mines Inc.
c/o Hecla Limited
6500 N. Mineral Dr., Suite 200
Coeur d'Alene, ID 83815-940
Attention: Legal Dept.

With a copy to:

Elizabeth H. Temkin
Partner
TEMKIN WIELGA & HARDT LLP
1900 Wazee Street
Suite 303
Denver, CO 80202

As to Thomas E. Congdon:

Thomas E. Congdon
1776 Lincoln Street, Ste. 800
Denver, CO 80203

With a copy to:

Howard Kenison
Partner
LINDQUIST & VENNUM, LLP
600 17th Street, Suite 1800-S

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Denver, CO 80202

XIV. RETENTION OF JURISDICTION

~~34~~31. This Court shall retain jurisdiction over this matter for the purpose of interpreting and enforcing the terms of this Consent Decree.

XV. INTEGRATION/APPENDICES

~~35~~32. This Consent Decree and its appendix constitute the final, complete, and exclusive agreement and understanding among the Parties with respect to the settlement embodied in this Consent Decree. The Parties acknowledge that there are no representations, agreements, or understandings relating to the settlement other than those expressly contained in this Consent Decree. The following appendix is attached to and incorporated into this Consent Decree: Appendix A is the map of the Gilt Edge Mine Superfund Site.

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XVI. LODGING AND OPPORTUNITY FOR PUBLIC COMMENT

~~36~~³³. This Consent Decree shall be lodged with the Court for a period of not less than thirty (30) days for public notice and comment. The United States reserves the right to withdraw or withhold its consent if the comments regarding the Consent Decree disclose facts or considerations that indicate that this Consent Decree is inappropriate, improper, or inadequate. Settling Defendants consent to the entry of this Consent Decree without further notice.

~~37~~³⁴. If for any reason this Court should decline to approve this Consent Decree in the form presented, this Consent Decree is voidable at the sole discretion of any Party and the terms of the Consent Decree may not be used as evidence in any litigation between the Parties.

XVII. SIGNATORIES/SERVICE

~~38. Each~~³⁵. The undersigned representative of ~~the each~~ Settling Defendants ~~Defendant~~ and each undersigned representative of the Plaintiffs certifies that he or she is authorized to enter into the terms and conditions of this Consent Decree and to execute and bind legally such Party to this document.

~~39~~³⁶. Each Settling Defendant agrees not to oppose entry of this Consent Decree by this Court or to challenge any provision of this Consent Decree, unless the United States has notified Settling Defendants in writing that it no longer supports entry of the Consent Decree.

~~40~~³⁷. The Settling Defendants shall ~~each~~ identify on their signature ~~pages~~^{page} the name and address of one agent who is authorized to accept service of process by mail on behalf of each of the Settling Defendants with respect to all matters arising under or relating to this Consent Decree. Settling Defendants ~~each~~ agree to accept service in that manner and to waive the formal service requirements set forth in Rule 4 of the Federal Rules of Civil Procedure and any

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applicable local rules of this Court, including but not limited to, service of a summons. The Parties agree that Settling Defendants need not file an answer to the complaint in this action unless or until the Court expressly declines to enter this Consent Decree.

XVIII. FINAL JUDGMENT

4438. Upon entry of this Consent Decree by the Court, this Consent Decree shall constitute the final judgment between and among the United States, the State of South Dakota, and Settling Defendants. The Court finds that there is no just reason for delay and therefore enters this judgment as a final judgment under Fed. R. Civ. P. 54 and 58.

SO ORDERED THIS ____ DAY OF _____, 2015.

UNITED STATES DISTRICT JUDGE

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FOR THE UNITED STATES OF AMERICA:

Date: _____

JOHN C. CRUDEN
Assistant Attorney General
Environment and Natural Resources Division

Date: _____

HEIDI K. HOFFMAN
Trial Attorney
Environmental Enforcement Section
United States Department of Justice
999 18th Street, South Terrace, Suite 370
Denver, Colorado 80202
(303) 844-1392

RANDOLPH J. SEILER
Acting United States Attorney
District of South Dakota

Date: _____

DIANA RYAN
Civil Chief, United States Attorney
District of South Dakota
515 Ninth Street, Suite 201
Rapid City, South Dakota 57701

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FOR THE U.S. ENVIRONMENTAL PROTECTION AGENCY:

Date: _____

KELCEY LAND
Director, Technical Enforcement Program
Office of Enforcement Compliance
and Environmental Justice
U.S. EPA Region 8
1595 Wynkoop Street
Denver, CO 80202

Date: _____

ANDREA MADIGAN
Acting Director, Legal Enforcement Program
Office of Enforcement Compliance
and Environmental Justice
U.S. EPA Region 8
1595 Wynkoop Street
Denver, CO 80202

FOR THE STATE OF SOUTH DAKOTA:

MARTY J. JACKLEY
Attorney General
State of South Dakota

Date: _____

RICHARD M. WILLIAMS
Deputy Attorney General
State of South Dakota
1302 E. Highway 14, Suite 1
Pierre, South Dakota 57501
(605) 773-3215

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FOR SETTLING DEFENDANT COCA MINES, INC.:

Date: _____

PHILIP S. BAKER, JR. ~~Michael Clary~~
Vice President and CEO
Hecla Limited (~~f/k/a Hecla Mining Company~~)
CoCa Mines Inc.
6500 N. Mineral Drive
Suite 200
Coeur d'Alene, ID 83815

Date: _____

BETSY TEMKIN
Partner
Temkin Wielga & Hardt LLP
1900 Wazee Street
Suite 303
Denver, CO 80202
(303) 382-2901

Agent for Service of Process:

[Agent]

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FOR SETTLING DEFENDANT THOMAS E. CONGDON, INDIVIDUALLY:

Date: _____

THOMAS E. CONGDON
1776 Lincoln Street
Suite 800
Denver, CO 80203

Agent for Service of Process:

[Agent]

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